

NO. 35581-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

PAUL DOUGLAS PRICE, APPELLANT

[Handwritten signature]
07 SEP 17 PM 1:07
COURT OF APPEALS
DIVISION II
TACOMA, WA

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 05-1-04366-2

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KAREN WATSON
Deputy Prosecuting Attorney
WSB # 24259

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Was defense counsel’s decision not to object to a witness’ interpretation of defendant’s demeanor a legitimate trial strategy when defense counsel challenged the witness’ statement in cross examination?..... 1

B. STATEMENT OF THE CASE. 1

 1. Procedure..... 1

 2. Facts 3

C. ARGUMENT..... 7

 1. DEFENSE COUNSEL’S DECISION NOT TO OBJECT TO JACKSON’S COMMENT ON DEFENDANT’S Demeanor, BUT INSTEAD TO CHALLENGE THE COMMENT ON CROSS EXAMINATION WAS A LEGITIMATE TRIAL STRATEGY. 7

D. CONCLUSION. 15

Table of Authorities

Federal Cases

<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L. Ed. 2d 305 (1986).....	7, 9
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	8, 9, 10, 14
<u>United States v. Cronic</u> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	7
<u>United States v. Molina</u> , 934 F.2d 1440, 1447-48 (9 th Cir. 1991).....	9

State Cases

<u>State v. Carpenter</u> , 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).....	10
<u>State v. Ciskie</u> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	10
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 77, 917 P.2d 563 (1996).....	8, 9
<u>State v. Howland</u> , 66 Wn. App. 586, 594, 832 P.2d 1339 (1992).....	8
<u>State v. Huddleston</u> , 80 Wn. App. 916, 912 P.2d 1068 (1996)	8
<u>State v. Madison</u> , 53 Wn. App. 754, 763, 770 P.2d 662 (1989).....	9
<u>State v. McFarland</u> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).....	8, 9
<u>State v. Thomas</u> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)	8

Constitutional Provisions

Sixth Amendment, United States Constitution.....	7, 8
--	------

Rules and Regulations

ER 609	2
--------------	---

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defense counsel's decision not to object to a witness' interpretation of defendant's demeanor a legitimate trial strategy when defense counsel challenged the witness' statement in cross examination?

B. STATEMENT OF THE CASE.

1. Procedure

On September 6, 2005, the State charged Paul Douglas Price, hereinafter "defendant" with one count of theft of a firearm and one count of second degree unlawful possession of a firearm. CP 1-3. The parties appeared for trial before the Honorable Kathryn Nelson on March 28, 2005. 2 RP 6¹. The State advised the trial court that "defendant had

¹ The verbatim record of proceedings consists of thirteen volumes that are referred to as follows:

March 27, 2006, will be referred to as 1 RP

March 28, 2006, will be referred to as 2 RP

Opening Statements on March 29, 2006, will be referred to as OS3 RP

Witness testimony on March 29, 2006, will be referred to as 3 RP

March 30, 2006, will be referred to as 4 RP

April 10, 2006, will be referred to as 5 RP

April 11, 2006, will be referred to as 6 RP

April 12, 2006, will be referred to as 7 RP

April 13, 2006, will be referred to as 8 RP

May 5, 2006, will be referred to as 9 RP

July 28, 2006, will be referred to as 10 RP

October 6, 2006, will be referred to as 11 RP

November 3, 2006, will be referred to as 12 RP

numerous Evidence Rule 609 convictions that the State intended to use for impeachment purposes” should defendant choose to testify. 2 RP 7.

Defense counsel advised the court that he did not believe defendant’s prior history would be an issue because he did not plan on calling defendant to testify. 2 RP 7; 3 RP 40. Defense counsel successfully made motions in limine to suppress any mention that defendant had an outstanding warrant at the time of his arrest and to suppress a co-defendant’s statement of defendant’s drug use. 3 RP 41-43. The State filed a corrected information on April 10, 2006, which corrected a scrivener’s error and added the stolen firearm’s serial number to the information. CP 8-9; 6 RP 209-10. Rather than allow the State to prove defendant was a convicted felon, an element of the second degree unlawful possession of a firearm count, defendant stipulated that he had previously been convicted of a felony. 5 RP 210-12. Defense counsel objected to the State’s proposed language for the stipulation and successfully argued that his proposed language should be used instead. 5 RP 210-12. A jury convicted defendant as charged on April 13, 2006. 8 RP 398-99. Defense counsel filed a motion for a new trial/arrest of judgment on April 27, 2006. CP 43-44. After hearing argument, the court denied the motion and sentenced defendant to a standard range sentence on each count to run consecutive with each other. 12 RP 449. The court sentenced defendant to 60 months on his the second

sentenced defendant to 60 months on his the second degree unlawful possession of a firearm conviction and 77 months on defendant's theft of a firearm conviction for a total of 137 months. CP 112-23; 12 RP 449.

This timely appeal followed.

2. Facts

On August 17, 2005, during a routine inventory, Kristine Jackson², administrative manager for the Marksman, discovered two firearms missing from the store's glass display cabinets. 4 RP 100; 5 RP 216, 224, 238, 239-40. One of the missing firearms was a Para-Ordnance and one was a Heckler & Koch (H & K). 3 RP 49; 5 RP 216, 225, 240. Kristine Jackson rechecked the inventory and asked other employees if the missing weapons had been shown to customers recently. 5 RP 216, 240-41.

Michael Grabowski, the Marksman's owner, was advised of the thefts on August 20, 2005. 3 RP 49; 4 RP 99-100. Grabowski searched the store, but was unable to locate the firearms. 3 RP 51-52; 4 RP 104. He found the boxes for the missing firearms, but not the firearms themselves. 3 RP 51. The fact that the boxes were located concerned Grabowski because when a firearm is sold it is matched with its box. 3 RP 51-52; 4 RP 77.

At the time of this incident, the Marksman's surveillance system consisted

² Kristine Jackson and Bruce Jackson will be referred to by thier first and last names to avoid confusion.

of two cameras and a hard drive that recorded activities in the store. 3 RP 55, 58; 4 RP 73, 109. The cameras operated on a motion sensor so they only recorded when motion was detected. 4 RP 115-16. The hard drive stored approximately one week's data and before it looped and recorded over the oldest footage. 3 RP 53, 55, 58; 4 RP 116.

On Sunday, August 21, 2005, Grabowski called the store and told one of his employees to turn off the surveillance camera because Grabowski did not want to lose what was recorded on the hard drive. 3 RP 53, 58-59; 4 RP 105. The next day, a third gun, another Para-Ordnance, was discovered missing. 3 RP 54; 4 RP 101-102, 104, 106. This Para-Ordnance was seen in the store on Sunday, the day the surveillance cameras were turned off. 3 RP 54; 4 RP 102, 104-05. When Grabowski was notified of the most recent theft, he immediately put all handguns in a storage area and secured the storage area with a padlock. 3 RP 54, 59; 4 RP 90, 104, 106.

While conducting an intensive inventory to ensure no other guns were missing, Grabowski contacted the police to investigate the losses. 3 RP 54-55; 4 RP 106. Grabowski advised the police that he had a new employee, Dave Galloway, at the store and did not want to rule out the possibility of employee theft. 3 RP 55, 59-60; 4 RP 108; 5 RP 282; 6 RP 282, 292. Galloway was the last person to see the stolen H & K; he recalled showing it to a customer a couple of days before Kristine Jackson discovered the gun was missing. 4 RP 114; 5 RP 217-18, 219, 241, 259.

On Tuesday, August 23, 2005, Detectives Wright and Donlin went to the Marksman to interview employees regarding the firearm thefts. 3 RP 61; 5 RP 282. While interviewing Galloway, the detectives reviewed the surveillance video. 4 RP 112, 115; 5 RP 219, 284, 313, 314. The footage from August 16, 2005, showed an older male, later identified as defendant, enter the store, walk briefly to the left of the store before walking to the glass display cabinet where the H & K firearms were kept. 3 RP 62, 63; 4 RP 86; 5 RP 265. Defendant's appearance was distinctive. Defendant had a visible limp when he walked, his shoulders were not square, and his head tilted toward one shoulder. 5 RP 247, 248, 314, 317. The surveillance video showed defendant as he reached over the cabinet and slid open the door. 4 RP 86-87. He then reached over the cabinet a second time, grabbed a black object, placed it in his clothing, and exited the store. 3 RP 63; 4 RP 86-87; 5 RP 219, 265, 314. Defendant was in the store for a total of one minute and 37 seconds. See, Plaintiff's Exhibit No. 3. The only item missing from the cabinet was an H & K 9 mm handgun. 3 RP 63; 4 RP 88.

The three stolen guns were displayed in two separate jewelry cabinets. 3 RP 47; 4 RP 93. The cabinets were made of glass, had three shelves on which merchandise was displayed, and opened in the back with overlapping sliding doors. 3 RP 47; 4 RP 78, 93, 113-14. At the time of the theft, the cabinets did not lock. 3 RP 65; 4 RP 99; 5 RP 262, 297. The H & K firearms, grips, and sights were stored in the same display cabinet,

which was located immediately to the right of the store's entrance. 3 RP 49-50; 4 RP 124, 5 RP 252. The Para-Ordnances were displayed in a different cabinet located across the store. 3 RP 50; 5 RP 258.

At trial, Kristine Jackson, Bruce Jackson, Grabowski, and Detective Wright, all identified the defendant as the man in the surveillance video seen reaching into the H & K cabinet and removing an item from the cabinet. 3 RP 62-63; 4 RP 86, 157; 5 RP 247-48, 314, 317. Kristine Jackson, Galloway, and Detective Donlin testified that the item defendant removed from the H & K cabinet was a firearm. 5 RP 219, 247, 254, 284, 310. Grabowski and Kristine Jackson both testified that the only item missing from the H & K cabinet was the stolen H & K firearm. 5 RP 252, 255. Kristine Jackson testified that, while the Marksman occasionally displayed sights and grips in H & K cabinet, all of those items were accounted for in the inventory she conducted. 5 RP 252, 253-54, 255. The only item missing from the H & K cabinet was the stolen H & K firearm. 5 RP 255.

C. ARGUMENT.

1. DEFENSE COUNSEL'S DECISION NOT TO OBJECT TO JACKSON'S COMMENT ON DEFENDANT'S DEMEANOR, BUT INSTEAD TO CHALLENGE THE COMMENT ON CROSS EXAMINATION WAS A LEGITIMATE TRIAL STRATEGY.

Defendant claims he was denied effective assistance of counsel when his attorney chose to attack a portion of Bruce Jackson's testimony on cross examination instead of objecting to the testimony on direct. Brief of Appellant at 5. Defendant's claim of ineffective assistance of counsel fails because his attorney's decision to address Bruce Jackson's testimony on cross examination was a legitimate trial strategy.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. "The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L. Ed. 2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also, State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First a defendant must establish that defense counsel's representation fell below an objective standard of reasonableness. Second a defendant must show that defense counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687; State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the "heavy burden of showing that his attorney 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney's conduct failed to meet an objective standard of reasonableness. State v. Huddleston, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel's representation was reasonable and, taking into consideration the entire

record, that counsel made all significant decisions in the exercise of reasonable professional judgment. State v. McFarland, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. State v. Hendrickson, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objection had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. McFarland, 127 Wn.2d at 337; see also, Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the

errors, the fact finder would have had a reasonable doubt respecting guilty.”)

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988). In the present case, defendant cannot satisfy either prong of the Strickland test. Defendant’s claim of ineffective assistance of counsel is without merit and must fail.

a. Defense counsel was not deficient.

On appeal, defendant argues that “[t]he critical issue in the case was Mr. Price’s identity as the person seen on the surveillance tape taking the handgun.” Brief of Appellant at 7, 8. However, in his opening statement defense counsel acknowledged that defendant was the person in the surveillance video taking something from the Marksman. OS3 RP 9, 10-11.

Once the officers investigated the case and looked at the video, **they saw what appeared to be someone taking something off of a counter.** That, for the most part, ended the investigation. Mr. Price was subsequently arrested, and that’s why we’re here today.

OS3 RP 9 (emphasis added).

Tomorrow...morning...we're going to watch this video, and I want you all to pay particularly close attention to every moment and every detail of everyone in that video because **you'll see that Mr. Price walks in, he goes to another location in the store, he's looking at merchandise, he comes back over to that case that's right by the door and reaches up with his hand.** The evidence will not be clear enough for you to see anyone reach over, slide any door back, and reach in to a point where they would grab that gun...

OS3 RP 10-11 (emphasis added).

Defense counsel apparently made the decision not to challenge identity because defendant's physical features are so distinctive that identity could not have been a viable defense in this case. 3 RP 62; 5 RP 247, 248, 314, 317. Apparently, another factor in defense counsel's decision not to make identity the main issue in this case was the skips that developed in the surveillance video. 5 RP 296, 301, 302. The skips made it difficult to clearly see what defendant took from the Marksman. 5 RP 296, 301, 302. Because of the skips, *what* defendant took was less clear than *who* took it. As a result, identity was not the most critical issue in this case. Instead, the most viable defense, and the one offered by defense counsel, was that the item defendant took from the Marksman was not a firearm.

Defense counsel presented his case theory in a variety of ways. He elicited testimony that there were other items on the top of the cabinet that defendant could have taken, including flyers and business cards. 4 RP 140; 5 RP 228, 261-62. He elicited testimony that there were other items

kept inside the H & K cabinet, like gun grips and sights. 4 RP 124; 5 RP 227, 253. Defense counsel highlighted that other employees had access to the stolen firearms, that at least some of the employees knew that the surveillance video was turned off on the day the third firearm was stolen, and that Galloway, a new employee, was the considered a suspect in the thefts. 6 RP 370. In his closing argument, defense counsel reinforced these themes when he argued:

And I defy anyone to say that for certain, beyond a reasonable doubt, that that's a handgun being taken off that counter. You've heard that there are other items that were on the counter. There's business cards. There's brochures of hunting events, things of that nature.

6 RP 365.

Later in defense counsel's closing, he argued "...they were initially going to use surveillance because they suspected employees, and there was a good reason why. They suspected employees because of the ongoing nature of the thefts." 6 RP 370.

Defendant asserts that his attorney was deficient for failing to object to Bruce Jackson's testimony that defendant was lying when he told Bruce Jackson he hadn't stolen any guns and then looked away. However, defense counsel's decision not to object on direct examination was a legitimate trial tactic. In the present case, Bruce Jackson's trial testimony included many more details than were included in the statement he had written on the night defendant was arrested. 4 RP 199-202. Defense

counsel's cross-examination targeted the discrepancies between Bruce Jackson's in court testimony and his handwritten statement. 4 RP 199-202. Counsel's decision to impeach Bruce Jackson's testimony with his handwritten statement served both to raise questions about Bruce Jackson's memory and credibility with the jury while avoiding the risk of highlighting damaging testimony by objecting during direct examination.

When the trial is looked at as a whole, defense counsel acted reasonably when he presented his case theory to the jury, objected and moved to exclude evidence, and cross examined witnesses. Defense counsel was not deficient and defendant's claim must fail.

b. Defendant cannot show resulting prejudice.

Assuming, *arguendo* the court were to find defense counsel deficient, defendant would still need show that, but for defense counsel's actions, the result of the trial would have been different. Because he cannot meet this burden, his claim of ineffective assistance of counsel must fail.

The result of the defendant's trial would not have been different had defense counsel objected to Bruce Jackson's testimony. The evidence that defendant had stolen a firearm from the Marksman was overwhelming. Grabowski, Bruce Jackson, Kristine Jackson, and Detective Wright all identified defendant as the person seen on the surveillance video stealing the H & K on August 16, 2005. 3 RP 62-63; 4

RP 86-88, 157, 170-71; 5 RP 247. Defense counsel conceded in opening statement that the person in the video was the defendant. OS3 RP 10-11. Grabowski, Kristine Jackson, and Galloway recognized the item defendant stole from the H & K cabinet as a firearm. 5 RP 219, 247, 254. The only item missing from the H & K display cabinet was the stolen 9 mm H & K hand gun. 3 RP 63; 4 RP 88.

Because the evidence against defendant was overwhelming, the result of the trial would not have been different had defense counsel objected to Bruce Jackson's testimony instead of addressing it on cross examination.

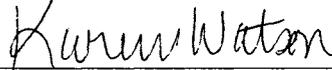
Defendant's claim of ineffective assistance of counsel fails to meet either prong of the Strickland test. Defense counsel was not deficient because his failure to object was a legitimate trial tactic and, defendant cannot show prejudice because the evidence of defendant's guilt was overwhelming.

D. CONCLUSION.

For the aforementioned reasons, defendant's convictions should be affirmed.

DATED: September 17, 2007

GERALD A. HORNE
Pierce County
Prosecuting Attorney



Karen A. Watson
Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/17/07 Johnson
Date Signature